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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

In re LUCILLE D., a Person Coming
Under the Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
& FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

KELSIE R., et al.,

Defendants and Appellants.

A144198

(Contra Costa County
Super. Ct. No. J1400585)

We first reviewed this Welfare and Institutions Code section 300¹ dependency case when Kelsie R., the mother of Lucille D., petitioned for an extraordinary writ to vacate an order bypassing reunification services. In an unpublished opinion, we rejected Kelsie's claim that there was insufficient evidence she had resisted substance abuse treatment. (*Kelsie R. v. Superior Court* (Dec. 9, 2014, A143116) [nonpub. opn.].) This time, Kelsie and father Joshua D. both appeal the juvenile court's orders denying their section 388 petitions seeking reunification services and terminating their parental rights. We affirm.

¹ All statutory references are to the Welfare and Institutions Code.

BACKGROUND²

The Petition, Detention, and Jurisdiction

This family's history with respondent Contra Costa County Children & Family Services Bureau (Bureau) dates back to a night in December 2011, when Kelsie and Joshua passed out from drug use in a motel room, leaving then-three-month-old Lucille unattended overnight. Lucille was removed from their care, and the Bureau filed a section 300 petition alleging that Kelsie and Joshua had serious and chronic substance abuse problems that impaired their ability to care for their daughter.

Both parents were provided reunification services and reunified with Lucille in September 2012 under a family maintenance plan. Kelsie was unable to maintain her sobriety, however, and relapsed in March 2013,³ which resulted in Lucille's detention from her and the termination of her family maintenance services. Lucille remained in Joshua's care, and in February 2014, the court granted him full physical and legal custody and terminated the dependency proceeding.

In May 2014, just three months after dismissal of that case, Joshua also relapsed, neglecting to pick Lucille up from daycare on two occasions due to his methamphetamine and cocaine use. Lucille, by then two-and-a-half years old, was taken into protective custody.

On May 28, 2014, the Bureau initiated the dependency proceeding that is the subject of this appeal, alleging in a section 300 petition that Joshua had a chronic substance abuse problem that impaired his ability to adequately parent Lucille and that Kelsie had a history of substance abuse and failed to reunify with Lucille in the prior dependency proceeding.

² We are familiar with the facts of this case leading up to disposition. Many of them are irrelevant to the issues on appeal, and we omit them from our background summary.

³ Her date of relapse is also stated in the record as around Christmas 2012 or April 2013.

At a detention hearing the next day, the parents submitted on detention, and the court ordered Lucille detained.

The following week, the parents pleaded no contest to the allegations in the petition, and the court sustained the allegations.

Disposition

In a disposition report prepared on June 25, 2014, the Bureau recommended that the court deny reunification services to both parents pursuant to section 361.5, subdivision (b)(13).⁴ The recommendation was based on the parents' "extensive substance abuse histories" which "has clearly had a profoundly negative impact on Lucille's psyche." According to reports from Lucille's foster care and daycare providers, she had "increasingly demonstrated aggressive/assaultive tendencies and self harming behaviors (picking at her eyebrows, forcing herself to vomit) that warrant therapeutic intervention." The Bureau believed the parents' "risk of relapse [was] far too great and consequences for Lucille far too severe" should the parents fail to reunify.

The juvenile court held a contested disposition hearing on September 17, 2014. Although Kelsie and Joshua were both present at the hearing, their testimony came by way of offers of proof from their respective counsel. Kelsie's counsel represented that she would testify as follows:

"She is currently still in Casa Ujima in the inpatient program. She has been there for I believe 3 months at this time and—more than 3 months, actually. She is planning on extending her time there in part because she is now enrolled in Shelter Inc., and could be getting housing any time from now to 90 days from now.

"She is planning on participating in aftercare. She is looking both at La Casa Ujima and A Chance For Freedom and any other possible aftercare facility that I might know of.

⁴ Section 361.5, subdivision (b)(13) authorizes the denial of reunification services where "the parent . . . has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition"

“She did receive an award at Ujima that is not your typical certificate of completion. She actually was voted the . . . [¶] [m]ost improved parent.

“Visits have gone well. She does acknowledge that there is an initial reluctance and [Lucille] has to warm up to mom. But I believe that those case notes will reflect that mom is very age appropriate.”

Joshua’s attorney made the following offer of proof on his behalf:

“[Joshua] entered detox through Pueblo Del Sol on June 20th. Then he entered the Discovery House residential treatment program on June 25th. He is going to be taking another 30-day extension so that he will be graduating on October 23rd. While he’s been at Discovery House he has been taking parenting classes, attending three to five AA/NA meetings per week. He is working on his relapse prevention plan. At this time as opposed to last time he has much stronger support system inside Discovery House as well as making connections in his AA/NA groups. He has a sponsor. He is currently on step four. He describes himself as being vulnerable and actually reaching out this time, which he was not doing last time.

“He’s also on his medication this time, which he was not last time. He has also been consulting with a psychiatrist and they have been adjusting his meds to fit his needs.

“Another portion of his relapse prevention is what he calls the red dog/blue dog cards, which are basically cards that he uses to keep himself in check. The red cards are negative behaviors, negative thoughts and feelings. And the blue cards are positive thoughts and feelings. So if he’s feeling triggered, he goes to his red card, figures out what it is and then goes to the corresponding blue card. So he’s learning some tools for relapse prevention.

“He’s currently taking anger management class[es]. Some of the topics that are explored in the general discussions of Discovery House are co-dependency topics.

“He is interested in finding housing. One of the reasons why he’s taking an extension is to get further help with housing. He has several referrals that he’s working with through Discovery House as well as Shelter Inc., and some other individuals that he’s been acquainted with. He has kept in contact with his former employer when he was

doing the tile work. And the employer is willing to give him a job as soon as he's able to leave Discovery House, which would be October 2nd. Discovery House will allow him to start leaving and work.

"He has been visiting consistently one time per week for an hour. I know at one point there was some confusion as to the visits. He did get two hours as makeup visits. He is requesting that those visits continue, that he continue to be able to see his daughter one time a week. . . .

"He has been testing consistently for the County. He has not missed any test. He also is randomly tested at Discovery House and he has not tested positive. He would have been expelled."

At the conclusion of the hearing, the court adopted the recommendation of the Bureau and denied reunification services to both parents, with the following observation:

"I have to say, when this case first came on calendar for the detention [and] jurisdiction report, what stayed with me was how the child cried at night for her father because she was so traumatized by having yet once again to be removed from the care and custody of a parent.

"And it is really tragic for a child of Lucille's age to be bounced in and out and in and out of this home. And nothing can undo the trauma that she's endured thus far.

"So what the Court needs to do at this point is figure out how best to proceed for the benefit of Lucille, who is a very young child, who has significant issues for a young child based on her repeated contacts with the Court as a result of her parents' complete failure as it relates to chronic substance abuse issues and father's mental health issues intertwined with the substance abuse issues.

"I'm going to follow the recommendation of the Department. I applaud the parents for participating in services and attempting to address the issues that bring their family back before this Court. But this is a little girl. And this is a little girl who deserves some permanence in her life. And thus far, she's been denied that; and hence, we see the results of that denial."

The court also reduced visitation to one hour twice a month. It then continued the matter for a section 366.26 selection and implementation hearing on January 7, 2015.

As noted, Kelsie filed a petition for extraordinary writ relief challenging the order bypassing family reunification services, which we denied on December 9, 2014.⁵ (*Kelsie R. v. Superior Court, supra*, A143116.)

Meanwhile, in October 2014, after a six-week transition period, Kelsie was placed with a foster mother who was identified as her prospective adoptive parent.

The Bureau's Section 366.26 Report

In advance of the section 366.26 permanency hearing, the Bureau submitted a report in which it recommended termination of parental rights and adoption as the permanent plan for Lucille. In addition to setting forth the history of the case, the report detailed the family's visitation record since the disposition report. Kelsie had regularly visited with Lucille each month and was always very happy to see her daughter. In the earlier visits, Lucille was reserved at the beginning, eventually warming up and becoming more interactive. In the later visits, Lucille ran to Kelsie when she saw her. When asked if Kelsie was "mommy," Lucille nodded her head and reached out for Kelsie. According to the social worker, Lucille was engaged with Kelsie and seemed comfortable in her presence, often playing chase, doing projects, and giggling. She did not cry or appear distressed at the end of the visits.

Joshua had visited Lucille five times in July and September. She was generally very excited to see her father and sometimes resisted ending the visit. Their visits tended to be relatively quiet, and they often spent time watching a movie. Between September 17 and November 5, 2014, however, Joshua did not visit Lucille. He called her once in early October and was supposed to call shortly after that but did not. On October 16, staff at Lucille's school reported that she had been aggressive towards other students and had been very emotional, asking the staff to call her father and "tell him to come back."

⁵ Joshua filed a notice of intent to file a writ petition, but failed to file a timely petition.

Joshua resumed visiting with Lucille in November 2014. She seemed surprised to see him and then ran to him, although she later stood still and covered her face, seemingly overwhelmed at seeing him after a prolonged absence. Joshua was very subdued in his demeanor and interactions with Lucille.

Joshua also had a number of telephone conversations with Lucille. The foster mother reported that after the phone calls, Lucille acted out. During one telephone call in August, she heard Lucille tell Joshua, “[D]on’t say that, you know that you’re not going to call.” After the call, Lucille hit the foster parent’s dog on the head with a toy truck and called the foster parent and her child curse words.

The Bureau offered the following evaluation of Lucille’s bond with her parents:

“Lucille has recent memory of her father as a caregiver. Her emotional connection to the father is evidenced by the high level of distress she has expressed about being separated from him since her most recent removal. While it can be said that a significant parent/child relationship does exist between the father and Lucille, it is also apparent that the relationship has been negatively affected by the short length of the visits, as well as a lack of predictability, in the sense that there have been unexpected breaks in phone calls and visits from the father. At times Lucille is hesitant when greeting the father, and at other times the father has difficulties either reading Lucille’s cues or interacting with her in the way that she is seeking. Though there is a significant parent/child relationship between the father and Lucille, it does not outweigh the benefits of legal permanency for the child.

“The mother has not been a primary caregiver for Lucille for almost two years, and during that time period she did not visit Lucille for almost one year. During the most recent dependency, the mother has been consistent in her visits with Lucille, during which the mother makes excellent efforts to interact with the child. Lucille does seem to enjoy the time she spends with the mother. However, Lucille does not appear to see the mother as the primary caregiver, and does not express a deep emotional connection to the mother. The parent/child relationship that does exist between the mother and Lucille does not outweigh the benefits of legal permanency for the child.”

According to the Bureau, the foster parent reported that Lucille did not bring up Kelsie but frequently brought up memories about Joshua and expressed a desire to see him, asking why Joshua did not want her anymore. Lucille had three phone calls with Kelsie in the previous months, which Lucille resisted. She had also stated on one occasion that she did not want to visit with Kelsie. The Bureau informed the court that during the dependency proceeding, Lucille had “exhibited numerous behaviors that indicate[d] emotional distress,” including anger outbursts, aggression, profanity, crying jags, defiance at school and in her foster home, and frequent night terrors. A wraparound facilitator who had previously worked with Lucille observed that she was more closed and less trusting since her most recent detention. The foster mother reported that after the visits with the parents, particularly Joshua, Lucille often had angry outbursts and bouts of crying, saying that she missed her father. In the week following visits, Lucille experienced increased night terrors and separation anxiety.

In its “assessment/evaluation,” the Bureau concluded: “[The Bureau] has been involved with this family since December 2011, when Lucille was detained from the parents at the age of three months. While both parents were able to successfully complete substance abuse treatment and reunify with one year old Lucille, both parents continued to struggle with addiction, as well as mental health issues in the father’s case. The mother has not cared for Lucille since approximately February 2013, and Lucille was removed from the father’s care for a second time in May 2014. Several people who have had long term involvement with the family and with Lucille have noted the emotional toll that these losses have taken on now three year old Lucille. On September 17, 2014, no reunification services were offered to either parent, though they were both actively engaged in substance abuse treatment. It was believed that the parents’ risk of relapse was too great, and the consequences for Lucille would be too severe.

“Lucille does have a significant parent/child relationship with her father, though it has been negatively affected by the separation from him as well as a lack of predictability. While Lucille enjoys spending time with her mother, she does not appear to have a significant parent/child relationship with the mother. Neither of these

relationships outweigh the benefits of legal permanency for the child, which include a sense of stability and reliability that Lucille truly needs.”

Report of the Court-Appointed Special Advocate

Itala Olivari, who was appointed Lucille’s court-appointed special advocate (CASA) on December 16, reported that she first met Lucille on January 2, 2105. She observed Lucille and her foster mother to be comfortable and affectionate with each other. The foster mother had told Olivari that Lucille’s moods and behavior had improved, as she was taking naps, taking pride in her appearance, learning to share and play better with other kids, and being more social. The frequency of Lucille’s night terrors had decreased, although they increased after visits with Joshua.

In light of her limited involvement in the case up until that point, Olivari declined to make a recommendation, but she expressed a concern that this was three-year-old Lucille’s second dependency proceeding due to her parents’ chronic substance abuse and that the stress of the situation had caused Lucille to engage in self-destructive behaviors.

Section 388 Petitions to Change the Order Denying Reunification Services

On January 7, 2015, the day the matter was set for the section 366.26 hearing, Joshua and Kelsie filed section 388 petitions to change the September 17 order denying reunification services. Kelsie sought reunification services and increased visitation with Lucille based on the following purported changes: “Mother has 355 days of being clean and sober as of 1.7.15. She completed her inpatient program at La Casa Ujima and received her certificate of completion. She also has certificates of completion for anger [management] and parenting programs. She obtained housing for herself in Martine[z], with assistance from Shelter Inc. She works at . . . Canine Design in Martinez and has been at this job since before she completed her inpatient program. She is attending A Chance for Freedom’s outpatient program Mondays and Thursdays from 6:00 to 7:30 p.m. She attends two to four AA/NA meetings per week and is working on Step 8 with her sponsor. Mother has consistently visited with her daughter th[rou]ghout the pendency of this case.”

Kelsie contended that the requested changes would be better for Lucille because she “will benefit from being raised by her mother as she can be part of an extended family that has loved her since her birth. Mother has a job and housing and will be able to provide Lucille with a safe and loving home once Lucille is returned to her. Mother will be able to help the minor avoid problems with substance abuse with the increased knowledge mother has gained through the programs she has completed and is completing. Minor clearly has a relationship with mother, as evidenced by their interactions during visits. Minor should have the opportunity to see this relationship grow and strengthen as she and mother are able to spend more time together.”

Joshua’s petition was based on his representation that he “graduated from Discovery House on 10/9/14. Working full time, signed up for A Chance For Freedom, attends meetings, last visited on 12/15/14 and has requested a visit for this month.”

As to why the requested order would be better for Lucille, Joshua stated, “Lucille is suffering from her lack of contact with her father, having night terrors, aggressive behaviors, angry outbursts and increased separation anxiety. Lucille brings up memories about her father and expresses a desire to see her father saying she misses her father. She has asked the foster parent why her father doesn’t want her anymore. There is a significant bond between Lucille and her father and the relationship has been negatively affected by the short length of visits.”

Hearing on Section 388 Petitions and 366.26 Permanency

A joint hearing on the section 388 petitions and permanency commenced on January 7, 2015.

Joshua testified that he had entered Discovery House on June 23 or 25 and graduated on October 9, 2014. He claimed June 19, 2014 as his sobriety date. This was his first experience in a residential treatment program, and he learned a lot about himself, including that he did not need to use substances in order to be happy, have a good time, or talk to people. He used to have anxiety issues and could not talk to people or go out of the house if he had not used marijuana or “the benzos.” Through treatment, he learned

that if he felt depressed, he could talk to his family, friends, or sponsor. He did not have a sponsor while he was in the program, but found one the week before the hearing.

When Joshua was first at Discovery House, he was taking a large amount of antipsychotics, as well as an anti-depressant and other medication. The medications “really zonked [him] out” and “[m]ade [him] feel like a zombie.” He stopped taking them because his prescriptions ran out and he could not get refills. He started feeling better than he did when he was taking them, so he stayed off his medications, a decision he made without consulting a doctor. Joshua had last seen a psychiatrist in August 2014, but he had an appointment for the following week.

Joshua was living with his grandfather and working as an apprentice tile setter. Since May 2014, he had attended “[l]ots” of NA/AA meetings, although he stopped going in October and had just resumed attending meetings the previous week.

Joshua had visited with Lucille a number of times. He described the visits as “awesome,” going on to explain, “I love seeing her . . . and I know she loves seeing me . . . [¶] [b]ecause she gets all happy and . . . smiles When I see her, it’s like nothing else matters.” At the visits, they play with toys, read, color, or do whatever else Lucille feels like doing.

During the first dependency proceeding and after its dismissal, Lucille spent 11 months in Joshua’s sole custody, an arrangement that ended on April 23, 2014 when Joshua “was getting high and was unable to pick her up” from daycare. Joshua testified that he used for about three days at that time, having relapsed because he was “really stressed” and lonely and was not relying on his family or friends for support. He denied Lucille was in danger while in his care because he was not getting high when she was present.

When asked what assurances he could provide that he would not relapse again if the court ordered more reunification services, Joshua responded, “Well, I don’t want to use any more. In the past, I’d do the outpatient program, but in the back of my mind I had a feeling I might use again. And I really don’t want to, knowing everything that it

does and what it's done and what it's doing to Lucy, it just, it kills me. And alls [*sic*] I can do is show you."

Joshua believed it was in Lucille's best interest to continue to have a relationship with him because no one "should grow up not knowing their parents." He was not ready to have her returned to his care, however, because he did not have a place of his own. He believed his mental health was good enough to take care of her.

Kelsie was the next to testify. She acknowledged that during the first dependency, she left the family home in April 2013 after she had relapsed. She was out of Lucille's life from April 2013 to January 2014, except for one visit in November 2013. She resumed regular visits in January 2014 when she returned to the Bay Area. The last time Lucille spent the night with Kelsie was in April 2013. Kelsie agreed that if all of the visits in 2014 were aggregated, she had spent less than a week with Lucille that whole year.

Kelsie claimed January 17, 2014 as her sobriety date. She entered a residential treatment program at La Casa Ujima on June 3, 2014 and graduated on November 25, 2014. While there, she participated in drug and alcohol, parenting, anger management, and women's issues classes. She attended three to five AA/NA meetings each week while in the program, had a sponsor, and had completed step seven. She also drug tested every weekend and never had a positive test. After graduating, she moved into an outpatient program at A Chance For Freedom and was still involved in that program at the time of the hearing.

Kelsie had been seeing a therapist since about 45 days into the program. She continued to see her and believed she benefited from the therapy.

While at La Casa Ujima, Kelsie obtained employment at a dog grooming salon in Martinez and was still working there at the time of the hearing.

Kelsie had been visiting with Lucille once a month and had not missed any of her visits. Asked to describe how the recent visits had gone, Kelsie said there were a couple of times when Lucille was "kind of standoffish" until she warmed up and then they had a "really good visit." Kelsie understood that Lucille was "protecting herself" because she

had been in and out of Lucille's life and that her actions had hurt Lucille and caused her to have abandonment and trust issues. If given an opportunity to have more visits, Kelsie would promise Lucille that she was not going to disappear again and would "make a living amends to [her] for the rest of her life."

Kelsie did not feel she was prepared to have Lucille placed with her at that time. She had everything she needed—a roof over her head, essentials for living, "[a]ll the basic needs"—but she believed a transition would need to be gradual, "increased visits . . . slowly, but not over just like a period of two months, but over a longer period than that, to like gradually let her know that I'm coming more into her life."

Following Kelsie's testimony, the hearing was continued to January 30, 2015, when social worker Anne Dimas, who had been assigned to the case since September 2014, was called to testify. According to Dimas, on October 24, 2014, Lucille was placed with her current foster mother, whom she usually called "sissy" and sometimes "mommy." Dimas had observed Lucille in that placement, noting that she had a nice bedroom decorated the way she liked it and a playroom with lots of toys. Lucille's foster mother had created a positive environment for Lucille and they "bonded really quickly." They did a lot of fun activities together, and the foster mother was very organized in getting Lucille to her activities and visits.

Dimas had supervised four visits between Kelsie and Lucille. At the start of the visits, Lucille would walk up to Kelsie (whom she called "mommy"), Kelsie would carry her into the visitation room, and they were always happy to see each other. At some visits, Lucille got hyper and liked to run around and play a game of chase, and Kelsie played along with her. Lucille also sometimes reverted to nonverbal communication, "kind of makes a lot of sounds and animal noises and stuff rather than using words." Dimas believed the behavior was prompted by anxiety, although she acknowledged it could also be a game Lucille was playing. While Lucille was not always as affectionate throughout the visit as she was at the greeting, Kelsie was very affectionate and made positive comments like, "I love you, you're so cute, good job." Lucille did not often say

“I love you” or “I miss you,” but she had fun with Kelsie. At the end of each visit, she transitioned well into ending the visit.

Dimas had observed three visits between Joshua and Lucille. At the first visit, Lucille had not seen Joshua in a few months, so she “held back a little bit” and seemed “unsure of what to do.” She then warmed up and gave him a hug. Dimas described Joshua as a “little bit more quiet and reserved” than Kelsie so the visits were quieter. The second visit went “a little bit better” because Lucille had seen Joshua more recently. The paternal grandmother came to the third visit, and she was very interactive with Lucille, while Joshua remained quieter. Again, Lucille transitioned well at the end of visits.

Lucille continued to receive wraparound services and had been seeing an individual therapist since October 2014 because of behavioral problems she had exhibited, problems that included engaging in self-injurious behavior such as pulling her hair out and picking at her skin, swearing at people, behaving defiantly, having outbursts and crying jags, becoming angry and assaultive, and hurting other students by hitting, kicking, and biting them. The therapist had seen Lucille a number of times on the same day she had visited with her parents and observed that Lucille behaved differently after the visits, acting more “anxious, clingy and clammed up.” One time recently, Lucille was “fine” during the therapy session, but had an outburst at the end of the session, “flopp[ing] on the floor, almost hit[ting] her head on a shelf,” “crying and screaming” to the point that the therapist was unable to control her. On the issue of continued visits between Lucille and her parents, the therapist told Dimas that if Lucille was not going to be returned to her parents, she did not see the benefit of continued visits. According to the therapist, at her age, Lucille would probably be able to move on fairly easily if she were to stop seeing her parents.

Dimas disagreed with Kelsie’s request for additional reunification services because, while Kelsie had accomplished a lot in terms of her sobriety and was very appropriate in her visits, it had been a long time since she had taken care of Lucille and they did not have a parent-child relationship. Lucille enjoyed spending time with her but did not think of her as a primary caregiver. In Dimas’s opinion, it would be very anxiety-

producing for Lucille to have increased visits with Kelsie, and it would not be in Lucille's best interest to reunify with Kelsie.

Dimas likewise did not support Joshua's request for additional services. She believed he and Lucille shared a parent-child relationship, noting that Lucille had a lot of emotions about Joshua that she did not exhibit about Kelsie, but Dimas had concerns about his ongoing sobriety. When she first started handling the case in September 2014, he was out of contact for two months and had seemingly given up, which did not demonstrate that he was in a good place to try to reunify with Lucille.

Dimas also noted that Joshua completed a treatment program but that he had not consistently been participating in AA/NA or a clean and sober community since he graduated. This was concerning because when he relapsed in May 2014, he did not have a good support system. She was also concerned about his mental health because although he was diagnosed as bipolar, he did not believe that was a correct diagnosis and went off his medication. He was not being treated by a doctor and had not seen a psychiatrist for "quite some time period."

Dimas summed up that "for both of the parents there is a chance that they could do well, and there's also a chance that they wouldn't do well." She was concerned that Lucille could not "handle any more back and forth because she has been back and forth since she was three months . . . old." Dimas noted that Lucille's behavioral and emotional issues had been improving, and she did not believe Lucille "could handle losing her current foster parent who she's made this amazing bond with, and then returning to one of the parents and having it fail. And it seems there's always a chance that it's going to fail, especially when you have parents who have long substance [abuse] histories."

Denial of the Section 388 Petitions and Termination of Parental Rights

At the conclusion of the hearing, the juvenile court denied the parents' petitions. First addressing whether Joshua had demonstrated a significant change in circumstances, the court noted that he had discontinued his psychotropic medications without consulting a medical professional and had not seen a psychiatrist since August 2014. He never

obtained a sponsor while in his treatment program, and only obtained one a week before he testified on January 7. Likewise, he stopped attending AA/NA meetings after completing his treatment program, only resuming his attendance one week before the hearing. And despite the bond Joshua and Lucille shared, he disappeared from her life in September, which was very harmful to Lucille. In light of this, the court concluded that Joshua had not demonstrated a change in circumstances sufficient to warrant granting his request.

Turning to Kelsie, the court believed she had “done much more” than Joshua, but it did not believe that reunification services and increased visitation would be in Lucille’s best interest. The court explained: “[W]ith Mom, given the lack of the relationship with the child, I do not believe it would be in her best interest to grant Mother’s motion and offer reunification services. This child really has moved on, and she has formed a healthy attachment and bond with her caregiver as evidenced by the child’s behavior when she’s in the presence of that caregiver. [¶] And this is a very difficult case because I truly believe Mother loves her child desperately, but I do not believe it would be in this child’s best interest to prolong permanency. And, in fact, I think it would be very damaging and detrimental to her to do.”

The court then turned to the issue of permanency, considering first whether the beneficial relationship exception to adoption applied. The first prong of the exception required the court to consider whether the parents had maintained regular visitation and contact with the child. The court concluded that while Kelsie had, it was a “much tougher argument for [Joshua] to make given that for six plus weeks he failed to” visit or contact Lucille, to a “profound” effect on Lucille. But, regardless of the court’s finding on the first prong, it concluded that the second prong of the exception—that the benefit to Lucille of maintaining the parent-child relationship outweighed the benefits of adoption—was not satisfied. Accordingly, the court did not find the beneficial relationship exception applicable. It therefore terminated Kelsie’s and Joshua’s parental rights to Lucille and ordered adoption as the permanent plan for her.

Kelsie and Joshua both filed timely notices of appeal.⁶

DISCUSSION

The Juvenile Court Did Not Abuse Its Discretion in Denying the Parents' Section 388 Petitions

Kelsie and Joshua first challenge the denial of their section 388 petitions.⁷ Under section 388, the juvenile court may modify or set aside a previous order if new evidence or changed circumstances exist and the proposed modification is in the best interests of the minor. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The parent seeking to change the court's prior order bears the burden of proof by a preponderance of the evidence (*ibid.*), and the juvenile court must liberally construe a section 388 petition in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Edward H.* (1996) 43 Cal.App.4th 584, 592.)

The ruling on a section 388 petition is committed to the juvenile court's sound discretion, not to be overturned unless an abuse of discretion is clearly established. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 (*Kimberly F.*) We ask only whether the trial court exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination, and cannot substitute our own decision for that of the trial court when two or more inferences can reasonably be deduced from the facts. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.)

In *Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 530–532, the Fourth District held that the determination of a child's best interests under section 388 involves consideration of a number of factors, including the seriousness of the problem leading to the dependency

⁶ Joshua's opening brief contains no substantive arguments, merely incorporating Kelsie's arguments by reference.

⁷ Section 388, subdivision (a)(1) provides in pertinent part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

and the reason for its continuation; the strength of the parent-child and child-caretaker bonds and the time the child has been in the system; and the nature of the change of circumstance, the ease by which the change could be achieved, and the reason the change did not occur sooner.

Recently, however, in *In re J.C.* (2014) 226 Cal.App.4th 503, 526–527 (*J.C.*), the same court criticized *Kimberly F.* for its failure to recognize that once reunification efforts have terminated, the focus must shift to the child’s need for permanency and stability. The court observed: “To understand the element of best interests in the context of a 388 petition, as in this case, on the eve of the .26 hearing, we turn to the Supreme Court’s language in *Stephanie M.*, *supra*, 7 Cal.4th 295: ‘[A]t this point “the focus shifts to the needs of the child for permanency and stability” (*In re Marilyn H.* [(1993)] 5 Cal.4th 295, 309) A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.’ [Citations.]” (*J.C.*, *supra*, at p. 526.) It concluded that the appropriate standard to apply is whether, after reunification services have been terminated, a parent petitioning for either an order returning custody or reopening reunification efforts has established that such a change will advance the child’s need for permanency and stability. (*Id.* at p. 527.)

Whether we apply the *Kimberly F.* criteria or the standard set forth in *J.C.*, we conclude the court did not abuse its discretion in denying the parents’ section 388 petitions.

Turning first to Kelsie, we commend her for the changes she made to address her addiction. As of the continued hearing date, she had completed a residential treatment program and claimed 379 days of sobriety. She was participating in an outpatient program, consistently attending AA/NA meetings, working through the 12 steps, and regularly seeing a therapist, and was employed. This certainly suggested changed circumstances. But, the second requirement for a successful section 388 petition—that the requested change was in Lucille’s best interest—was not supported by the record.

Kelsie had a substance abuse history dating back to her teens, with alcohol consumption starting when she was 14 years old and methamphetamine use when she was 15. She completed a residential treatment program when she was 16 years old, but relapsed three years later. Kelsie was nearly 25 years old at the time of the hearing, meaning substance abuse had been a part of her life for 11 years. The first dependency proceeding was necessitated by her—and Joshua’s— drug abuse, and Kelsie failed to reunify with Lucille in that proceeding as a result of her addictions. Given Kelsie’s addiction history, including its length and the relapses following both outpatient and inpatient treatment programs, the risk of yet another relapse remained very real.⁸

Nor did the relative strength of Lucille’s bond with Kelsie and her prospective adoptive mother suggest that ordering reunification services for Kelsie would be in Lucille’s best interest. As of the January 30, 2015 hearing, Lucille, who was then three years, five months old, had lived with her mother for only 10 months of her life. She had not been in Kelsie’s care since April 2013—nearly two years. As Kelsie acknowledged at the hearing, if visits in 2014 were aggregated, she and Lucille had spent less than a week together that entire year. This undermines Kelsie’s claim that Lucille lived with her “for significant periods of her life.” Moreover, while Kelsie had maintained regular visitation with Lucille and the visits were positive, social worker Dimas testified that Kelsie and Lucille did not share a significant parent-child relationship, and Lucille did not perceive Kelsie to be her primary caregiver. Between visits, she did not mention Kelsie or ask to see her, as she did Joshua.

On the other hand, Lucille had developed an “amazing” bond with her prospective adoptive mother in their three months together. Dimas had observed their interactions and testified that the foster mother had created a positive environment for Lucille and that they happily engaged in a lot of activities together. As Dimas described it, they “bonded really quickly.” Similarly, CASA Olivari reported that Lucille and her foster mother

⁸ This is not to say that sobriety after a long history of drug abuse can *never* support a section 388 petition seeking reunification services.

were comfortable and affectionate with each other. And, importantly, the behavioral problems Lucille had displayed since her detention were improving under the care of her prospective adoptive mother.

Kelsie dismisses the significance of Lucille's bond with her foster mother because of the brevity of the placement, describing the foster mother as "a new face" and the placement as not "deeply established." But a bond is not dictated by the length of a relationship, but rather by the quality of the relationship—and Lucille and her foster mother had developed, and were continuing to develop, a high quality relationship.

Also of significant concern was the potential for harm to Lucille should the parents be offered reunification services but fail to reunify. Lucille had experienced significant emotional issues while in foster care, which manifested as self-harming, aggression, and night terrors, among other problems. Both Lucille's foster mother and therapist reported an exacerbation of behavioral problems following visits with her parents, as well as by Joshua's disappearance from her life from September to November 2014. Lucille's prospective adoptive mother reported that Lucille's behavior had been improving over the months Lucille had been in her care.

Finally, at this point in the proceeding, Lucille's need for and entitlement to permanency was of primary concern. (*In re Jasmine D.*, (2000) 78 Cal.App.4th 1339, 1348 [after termination of reunification services, "the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount."]; *J.C.*, *supra*, 226 Cal.App.4th at p. 526.) Sadly, because of her parents' chronic drug problems, Lucille has been a dependent of the juvenile court for all but six months of her three-and-a-half years. She had been detained from Kelsie two times, with Kelsie disappearing from her life for over nine months following the second detention. She had not been in Kelsie's care for almost two years before the section 366.26 hearing. The importance of finally having stability and permanence cannot be understated, and the evidence did not support a conclusion that offering Kelsie reunification services was going to promote permanence for Lucille. On this record, it was not an abuse of discretion to deny Kelsie's section 388 petition.

Turning to Joshua, we need not even examine whether offering him reunification services would have been in Lucille’s best interest, because the record does not support a claim of changed circumstances. While in his treatment program, Joshua attended AA/NA meetings, participated in therapy, and initially took medications prescribed to treat his mental health issues. However, at some point, he ceased taking his medications without advice from a medical professional. After completing his program, he stopped attending AA/NA meetings and participating in therapy. Only immediately before filing his section 388 petition did he obtain a sponsor, start attending meetings, and schedule an appointment with his therapist. Again, on this record, we cannot conclude the juvenile court abused its discretion in denying Joshua’s section 388 petition.

The Juvenile Court Did Not Abuse Its Discretion by Failing to Apply the Continuing Beneficial Relationship Exception to Adoption

At a section 366.26 permanency hearing, the juvenile court must make one of six possible alternative plans for the dependent child, with the preferred plan being adoption. (§ 366.26, subd. (b)(1)–(6); *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) If the court finds the child adoptable, it must terminate parental rights unless termination would be detrimental to the child. (§ 366.26, subd. (c)(1); *In re Beatrice M.*, at p. 1416.) Section 366.26, subdivision (c)(1)(B) identifies six circumstances under which adoption would be detrimental to the child. Kelsie and Joshua contend that one such circumstance—where the “parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship” (§ 366.26, subd. (c)(1)(B)(i))—applied here. We review the juvenile court’s order declining to apply an exception to termination of parental rights for abuse of discretion (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1038; *In re Jasmine .*, *supra*, 78 Cal.App.4th at p. 1342), while reviewing the court’s factual findings for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575–576.) We conclude there was no abuse of discretion here.

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575, the court interpreted the beneficial relationship exception to mean “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent

home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." The child's age, the portion of the child's life spent in the parent's custody, the effect of the interaction between the parent and child, and the child's particular needs are factors which may be considered by the court in considering the applicability of the beneficial relationship exception. (*Id.* at pp. 575–576; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

There is no dispute that Kelsie maintained regular visitation with Lucille. The question thus was whether Lucille would benefit from continuing the relationship with her parent. As already discussed above, Kelsie and Lucille shared a friendly relationship, but the record does not contain substantial evidence that it was a parent/child relationship that promoted Lucille's wellbeing to such a degree as to outweigh permanency through adoption by her foster mother. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350 [to apply the continuing beneficial relationship exception, "a *parental* relationship is necessary . . . not merely a friendly or familiar one."].) And the evidence did not suggest that Lucille would suffer great harm if that relationship was severed. There was thus no abuse of discretion in declining to apply the continuing beneficial relationship exception to adoption.

DISPOSITION

The orders denying the parents' section 388 requests, terminating parental rights, and selecting adoption as the permanent plan for Lucille are affirmed.

Richman, J.

We concur:

Kline, P.J.

Stewart, J.